ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-664

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, vs. BARRY FLOYD BRAESEKE, Respondent.	RECEIVED NOV 24 1980 OFFICE OF THE CLERK SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Barry Floyd Braeseke, by and through his counsel, asks leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The affidavits of respondent and counsel in support of this motion are attached hereto.

CLIFTON R. JEFFERS
Chief Assistant
State Public Defender

Attorney for Respondent

CRJ:lbl

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Petitioner,	)
vs.	)
BARRY FLOYD BRAESEKE,	)
Respondent.	)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Barry Floyd Braeseke, respectfully requests that this court deny the Petition for Writ of Certiorari, seeking review of the judgment of California Supreme Court entered on August 28, 1980, reported at 28 Cal.3d 86, ___ P.2d ___, ___ Cal.Rptr. ___ (1980), and the opinion filed on November 15, 1979, and reported at 25 Cal. 3d 691, 159 Cal.Rptr. 684, 602 P.2d 384 (1979).

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case with the following additions:

Statement of Facts:

Sergeant Cervi understood that the "off the record" discussion with defendant could not be used against defendant (ST 21).[1/] This "off the record" conversation is separate and distinct from the confession statement (RT 125, 126-A; ST 22). After the conclusion of the "off the record"

1. Respondent adopts the abbreviations used by petitioner to refer to the record.

conversation, according to defendant's testimony, Sergeant Cervi told defendant "it would be better for [him]" if he gave a statement although he would have to go to jail (ST 56). Thereafter defendant gave a recorded, full confession (ST 26, 56; People's Trial Exhibit No. 32).

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT PRESENT THE OPPORTUNITY FOR MEANINGFUL REVIEW OF THE MIRANDA STANDARDS

This case does not present the opportunity for meaningful review by this Court of any legal proposition of general importance. The decision below turns upon a narrow issue growing out of an unusual factual setting, and therefore does not have general applicability to other situations that arise in the Miranda context.

The California Supreme Court's ruling is based on the limited issue of whether the prosecution proved a knowing and intelligent waiver by the defendant of his Miranda rights. After the defendant had asserted his right to counsel, the defendant initiated a conversation with Sergeant Cervi, one of the interrogating officers, on the expressed condition that it be "off the record" and alone with Cervi (ST 19, 20-22, 56; RT 124, 126A). Officer Cervi did not consider the "off the record" discussion to be a waiver of defendant's rights because he felt the statement could not be used against the defendant (ST 21). Petitioner recognizes that defendant did not intend to waive his rights and that Sergeant Cervi understood this (Pet. for Cert. 15). After the conclusion of the "off the record" conversation, Sergeant Cervi told defendant "it would be better for [him]" if he gave a statement (ST 56;

RT 125, 126).[2/] Defendant then confessed.

In finding that these facts do not satisfy the requirement of a knowing and intelligent waiver, the California Supreme Court followed long settled Miranda requirements. The California court ruling is so carefully circumscribed by the limited nature of the issue and the factual setting that this simply represents one of the many cases in which state courts routinely determine whether a suspect has waived his Miranda rights. The case therefore does not provide this court with a vehicle for a meaningful analysis and exposition of the requirements of a knowing and intelligent waiver in the Miranda context.

Moreover, the decision of the California Supreme Court is correct. On the record before it the California high court was not left to speculate about what the defendant and Sergeant Cervi had in mind in talking "off the record." Through the testimony of Sergeant Cervi the Court had before it direct evidence of the subjective state of mind of the parties at the time the discussion took place. This evidence conclusively establishes that both Sergeant Cervi and the defendant intended that their discussion would not be used against the defendant. Under these facts there simply is no basis for concluding that the initiation of the "off the record" conversation constituted a knowing and intelligent waiver. It clearly was just the opposite, an unambiguous expression by defendant of an intent not to waive his rights. Petitioner does not contend otherwise (See Pet. for Cert. 15).

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2. The California Supreme Court in deciding the case on the basis of the waiver question did not reach the issue of whether the confession was improperly induced by the promise of leniency.

Instead, petitioner takes issue with the California Supreme Court's conclusion that there can be no "off the record" discussion (Pet. for Cert. 15, footnote 7). In doing so, petitioner completely skirts the issue of whether the request by defendant to speak "off the record" constituted a waiver of his rights. Yet this is precisely the issue on which the California Supreme Court decision turns. "A request to speak 'off the record' cannot constitute a knowing and intelligent waiver of rights which include the advisement that 'anything [a suspect] says can be used against him in a court of law." (citations). 25 Cal.3d 702, 159 Cal.Rptr. 684, 602 P.2d 384.

> "In view of the lack of any credible evidence that defendant's initiation of the conversation with Sergeant Cervi constituted a knowing and intelligent waiver of his Miranda rights, we must conclude that the continued interrogation of defendant was in violation of Miranda and that the confession resulting therefrom is inadmisssible. [footnote omitted] (citations)." 25 Cal.3d 703, 159 Cal.Rptr. 684, 602 P.2d 384.

Whether one argues as petitioner does, that the "off the record" discussion request indicates that defendant understood his rights or on the other hand agrees with the conclusion of the California Supreme Court that it revealed a lack of understanding of his rights, the result is the same: a clear-cut decision by defendant not to waive his rights.

Petitioner's position seems to be that defendant understood his rights and therefore by initiating the "off the record" conversation he necessarily waived them. This view is flawed and unsustainable for several reasons. First, the confession was not made during the "off the record" discussion. Second, the logical application of petitioner's argument that defendant knew his rights and sought to avoid waiving them by talking "off the record" leads to the inescapable conclusion that defendant did not knowingly and intelligently waive his rights. Third, after the "off the record"

discussion had ended, Sergeant Cervi initiated the confession dialogue by telling defendant "It would be better for [him] if he gave a statement (ST 56). This was followed by Cervi entreating defendant, "can we put that in form of a formal statement, or again words to that effect. I said can I turn the tape recorder on, and can we get a statement from you to that effect" (ST 22).

Petitioner's argument fails to recognize that the "off the record" conversation is separate and distinct from the confession dialogue. By bluring this distinction petitioner erroneously concludes that "when he gave his first confession he no longer wanted to speak 'off the record,' but instead wanted to give a 'formal statement' (Cert. Pet. 16). The record simply does not support such a conclusion. As this Court noted in North Carolina v. Butler, 441 U.S. 369, 373 (1979), "the courts must presume that a defendant did not waive his rights; the prosecution burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." The California high court correctly applied this standard to the facts of this case, in finding "the lack of any credible evidence that defendant's initiation of the conversation with Sergeant Cervi constituted a knowing and intelligent waiver of his Miranda rights." 25 Cal.3d 703, 159 Cal.Rptr. 684, 602 P.2d 384.

It is worthy of note that although petitioner urges this Court to grant plenary review, at no point does he address the narrow waiver question which is the central issue presented by this case. Respondent suggests that this is so because had petitioner attempted to do so he would further demonstrate

that (1) this is not a case that merits review by this Court and (2) the California Supreme Court was correct in its ruling on the waiver issue.

The record of this case and the California Supreme Court's opinion reveal that petitioner's claim that the Miranda requirements have been impermissibly extended does not withstand close scrutiny. As we have shown, under the facts of this case, the California Supreme Court did not have to decide the waiver question on the basis of inferences alone. It could and did rely on the subjective state of mind of the parties involved. Thus petitioner's reliance upon North Carolina v. Butler, supra, 441 U.S. 369 (1979) is misplaced.

The circumstances under which the confession dialogue began are such that petitioner does not argue that defendant waived his rights at that juncture. For as the California Supreme Court implicitly recognized the "off the record" conversation was the vehicle by which Sergeant Cervi was able to generate the confession. Consequently, since the "off the record" discussion did not constitute a waiver there surely could not have been a knowing and intelligent waiver by defendant interposed between the "off the record" talk and Cervi's commencement of the confession.

Since there has been no extension of Miranda safeguards in this case, this is not an appropriate case for review by this Court.

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CONCLUSION

For the foregoing reasons respondent respectfully submits that the petition for a writ of certiorari to review the judgment of the Supreme Court of California should be denied.

DATED: November 21, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

CLIFTON R. JEFFERS
Chief Assistant
State Public Defender

CRJ:lbl

Attorneys for Respondent

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

No. 80-664

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BARRY FLOYD BRAESEKE,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

CLIFTON R. JEFFERS, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 1390 Market Street, Suite 425 in the City and County of San Francisco, State of California; that on November 21, 1980, he served a true copy of the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopess addressed respectively as follows:

George M. Deukmejian
Attorney General of the State of California
6000 State Building
San Francisco, California 94102

D. Lowell Jensen
District Attorney, Alameda County
1225 Fallon Street
Oakland, California 94612

Rene C. Davidson
County Clerk, Alameda County
1225 Fallon Street
Oakland, California 94612

Clerk, California Supreme Court
State Building
455 Golden Gate Avenue
San Francisco, California 94102

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

CLIFTON R. JEFFERS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-664

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BARRY FLOYD BRAESEKE,

Respondent.

AFFIDAVIT

I, CLIFTON R. JEFFERS, being first duly sworn according to law, depose and say, in support of respondent's motion for leave to proceed without being required to prepay costs or fees:

1. I am an attorney in the office of the California State Public Defender, licensed to practice law in the state of California and a member of the Bar of the Supreme Court of the United States.

2. I represented respondent in opposition to a previously filed Petition for Writ of Certiorari before the Supreme Court of the United States in the October Term, 1979, in case No. 79-1465.

3. In case No. 79-1465 respondent filed the attached affidavit in support of his Motion for Leave to Proceed in Forma Pauperis, and the motion was granted.

4. Due to difficulties in communication associated with mail delivery I have not received a more current affidavit from respondent.

5. There has been no change in respondent's status since the execution of the attached affidavit on April 8, 1980, in that he remains incarcerated in the California State Prison.

6. I believer Mr. Braeseke to be indigent and entitled to proceed in forma pauperis pursuant to Rule 45.

DATED: November 21, 1980

CLIFTON R. JEFFERS
Chief Assistant
State Public Defender

Duly witnessed and sworn
to before me, a notary public,
this 21st day of November, 1980.

Carol A Schmidt

CAROL A. SCHMIDT
NOTARY PUBLIC-CALIFORNIA
CITY AND COUNTY OF
SAN FRANCISCO
My Commission Expires Dec. 20, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1465

THE PEOPLE OF THE STATE OF CALIFORNIA, PETITIONER

vs.

BARRY FLOYD BRAESEKE, RESPONDENT

AFFIDAVIT

I, BARRY FLOYD BRAESEKE, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was sentenced to a California State prison by the Alameda County, California Superior Court on three (3) counts of first degree murder. My convictions were reversed by the Supreme Court of California. The present proceeding was commenced by the People of the State of California in a Petition for a Writ of Certiorari to the Supreme Court of California.

Barry Floyd Braeseke

Duly witnessed and sworn to before me, a Notary Public, this 8 day of April, 1980.

Notary Public